

# SENATE . . . . . No. 1800

---

## The Commonwealth of Massachusetts

PRESENTED BY:

**Stanley C. Rosenberg**

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

**An Act Relative to the Right of Publicity.**

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Stanley C. Rosenberg	Hampshire and Franklin
Garrett J. Bradley	3rd Plymouth
Stephen J. Buoniconti	Hampden
Gale D. Candaras	First Hampden and Hampshire
Denis E. Guyer	2nd Berkshire

# The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

## AN ACT RELATIVE TO THE RIGHT OF PUBLICITY.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1: Chapter 214 of the General Laws is hereby amended by striking out Section 3A and inserting in place thereof the following section:-

Section 3A. The Right to Publicity.

(a) The following definitions shall apply to this Section:

“Commercial Use” (1) the use of an individual’s identity in any medium and in any manner in connection with (i) the offering for sale, sale, promotion, or advertising of a product, merchandise, good, or service, (ii) fundraising, or (iii) other purposes of trade. Whether such a use is commercial shall be determined without regard to whether it is for profit or not for profit. Use of an individual’s identity is not a commercial use solely because the material or medium containing such use is commercially sponsored or contains advertising. It is a question of fact whether or not the use of the individual’s identity is so directly connected with the commercial sponsorship or with the advertising as to constitute a commercial use.

(2) Without limiting what other uses may be determined not to be commercial, it is not a commercial use of any individual’s identity (i) to publish, print, display, or use the individual’s identity as part of any

15 bona fide news report or commentary having a legitimate public interest or as part of an artistic or  
16 expressive work, such as a live performance, work of fine art, literary work, theatrical work, musical  
17 work, film, television, radio, or the like, except where the use is directly connected with advertising or  
18 another commercial use as defined in (1), above; (ii) to use a photograph depicting the individual as a  
19 member of the public where the individual is not named or similarly identified in connection with the use  
20 of the photograph; or (iii) to provide a medium through which a commercial use is made, unless it is  
21 established that the person had knowledge of the commercial use or unless the use was intended to  
22 promote the medium itself.

23 “To exercise” the right of publicity means to make a commercial use of an individual’s identity or to  
24 consent in writing to such commercial use by another person or persons.

25 “Identity” means any attribute of an individual that identifies that individual, including, without  
26 limitation, a name, likeness, voice, signature, or any distinctive appearance, gesture, or mannerism.

27 “Individual” means a natural person, living or deceased.

28 “Licensee” means any person who has written consent to make commercial use of an individual’s identity  
29 from the individual or the other person or persons authorized to exercise the individual’s right of publicity  
30 in subsection (c)(2).

31 “Name” means any legal, professional, or other name, including, without limitation, an assumed name or  
32 nickname, by which an individual is known or that is intended to identify that individual.

33 “Person” means any individual, firm, association, partnership, corporation, joint stock company, limited  
34 liability company, syndicate, receiver, common law trust, conservator, statutory trust, or any other  
35 concern or entity by whatever name known or however organized, formed, or created, and includes not-  
36 for-profit corporations, associations, educational and religious institutions, political parties, campaign  
37 committees, and community, civic, or other organizations.

“Successor-in-interest” means any person with an interest in an individual’s right of publicity as provided in subsection (c)(1) as an assignee, transferee, legatee, executor, administrator, personal representative, heir-at-law, distributee, guardian, conservator or otherwise. “Successor-in-interest” does not mean the individual or a licensee.

(b) Recognition of the right of publicity. Every individual has a property interest known as the right of publicity, which is the exclusive right to control commercial use of the individual’s identity during the individual’s lifetime and for seventy-five (75) years after the individual’s death, unless terminated earlier under subsection (c)(4).

(c) Transferability; Exercise; Termination.

(1) Notwithstanding any applicable law to the contrary, an individual’s right of publicity is freely transferable and descendible, in whole or in part, including, without limitation, by any form of inter vivos or testamentary transfer or by intestate succession, except that no interest in the right of publicity shall escheat to any state, commonwealth, or other jurisdiction.

(2) An individual’s right of publicity may be exercised or enforced only by (i) the individual, (ii) the person as successor-in-interest or licensee granted such power, or (iii) the persons controlling as successors-in-interest or licensees granted such power, in the aggregate, more than one-half of the interests in the individual’s right.

(3) All persons with an interest in an individual’s right of publicity shall make annual accountings to each other of all revenues generated from exercising and enforcing the right of publicity including, without limitation, from any recovery in a civil action and all expenses incurred in connection with such exercise and enforcement. Such persons may vary their rights and obligations under this paragraph by written agreement.

(4) A deceased individual's right of publicity will terminate (i) if at any time there is no successor-in-interest or (ii) upon proof that no successor-in-interest or licensee has made commercial use of the individual's identity for any continuous period of five (5) years occurring after the individual's death.

(d) Infringement; Civil action; Remedies.

(1) Infringement. Any commercial use of an individual's identity, other than by the person or persons authorized to exercise the individual's right of publicity in subsection (c)(2), shall constitute an infringement of the right of publicity.

(2) The person or persons authorized to enforce an individual's right of publicity in subsection (c)(2) may bring a civil action against any person who has infringed or is infringing the individual's right of publicity, to prevent and restrain the infringement, including on a preliminary basis, and to recover damages as described in paragraphs (3) and (4) of this subsection (d).

(3) Damages for infringement shall be awarded in an amount equal to the greater of (i) \$1,000 or (ii) The actual damages suffered as a result of the infringement plus any profit attributable to the infringement that is not taken into account in computing the actual damages. In establishing such profit, the injured person or persons alleging infringement must prove only the gross revenue attributable to the infringement, and the infringer must prove any deductible expenses.

(4) If the infringer has knowingly infringed the individual's right of publicity, the court, in its discretion, may award enhanced damages in an amount not to exceed three times the damages described in paragraph (3) of this subsection.

(5) When an action under this section is pending, the court may, in its discretion, (i) order that any materials claimed to have been made or used in the infringement of the individual's right of publicity be impounded and (ii) enjoin the use of any articles of tangible personal property or media, including but not limited to plates, molds, masters, tapes, and film negatives, used to reproduce those materials.

83 (6) As part of a final judgment or decree, the court may order the destruction or other reasonable  
84 disposition of all materials made or used in the infringement and of any articles of tangible personal  
85 property or media used to reproduce those materials.

86 (7) In any action under this section the court may order the infringer to pay reasonable costs, including  
87 attorneys' fees, incurred in connection with the enforcement of an individual's right of publicity.

88 (e) This section shall supercede and control notwithstanding any other general or special law to the  
89 contrary.